No. 76-785

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In the Supreme Court of the United States

OCTOBER TERM, 1976

DANIEL WALKER, Governor of the State of Illinois, DONALD PAGE MOORE, Director, Office of Special Investigations, State of Illinois, and LAURI STAPLES,
Petitioners,

vs.

SAMUEL COLAIZZI, SAMUEL INDOVINA, THEODORE MAROS, RAMON SCULLY and ZENITH ASSOCIATES, INC., an Illinois Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NO.

DANIEL WALKER, Governor of the State of Illinois, **DONALD PAGE MOORE**, Director, Office of Special Investigations, State of Illinois, and **LAURI STAPLES**,
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VS.

SAMUEL COLAIZZI, SAMUEL INDOVINA, THEODORE MAROS, RAMON SCULLY and **ZENITH ASSOCIATES, INC.**, an Illinois Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Daniel Walker, Governor of the State of Illinois, Donald Page Moore, former Director of the Office of Special Investigations of the State of Illinois, and Lauri Staples, a former investigator in the Office of Special Investigations of the State of Illinois, hereby petition that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on September 14, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not yet officially reported, is set forth in Appendix 1. (App. 1-10.) The order of the United States District Court for the Northern District of Illinois, Eastern Division, was not reported but is printed as Appendix 2. (App. 11.)

JURISDICTION

The Seventh Circuit's judgment was entered on October 14, 1976 (App. 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The principal question presented is whether 42 U.S.C. §1983 limits the Governor of Illinois' First Amendment right and duty to inform the public of the reasons for his discharge of two non-tenured public employees for misconduct in office. Subsidiary questions presented are (1) the impact of administrative determinations that the discharged employees were guilty of the charges announced by the Governor upon the discharged employees' due process claims, and (2) the availability of state and federal common law absolute immunities against suits seeking redress for injury to reputation in a civil rights context.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions, statutes and other authorities involved herein are the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §1983, Sections 8 and 10 of Article V of the Constitution of the State of Illinois, the Illinois Unemployment Compensation

Act (Ill.Rev.Stat. 1975, Ch. 48, §300, et seq.), and Executive Order No. 4 (1974). The texts of the pertinent provisions are reproduced as Appendix 5. (App. 17-19.)

STATEMENT OF THE CASE

This civil action for monetary damages and injunctive relief was brought by plaintiffs (respondents) Colaizzi and Indovina who were discharged by Governor Walker from their non-tenured positions as public employees for misconduct in office. Plaintiffs allege neither a protected property interest in their jobs, nor that they were discharged as a penalty for the exercise of any constitutional right. Rather, they assert that their discharge from public office, coupled with Governor Walker's public explanation of the reasons for his decision to discharge them, deprived them of liberty without due process of law. Jurisdiction of the District Court was alleged under 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. §§ 1981, 1983, and 1985, and the Fourteenth Amendment.*

The Allegations Of The Complaint

The case comes to this Court on the pleadings, defendants' motion to dismiss the complaint having been granted. The complaint may be summarized as follows.

At all relevant times, plaintiffs Colaizzi and Indovina were the duly appointed Supervisor and an investigator, respectively, for the Division of Private Employment Agencies of the Illinois Department of Labor. Defendants Scully and Maros were principals and agents of defen-

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* Although plaintiffs cite 42 U.S.C. §§1981 and 1985 in each count of their four-count complaint, they allege no racial or otherwise class-based invidiously discriminatory animus, and they abandoned their reliance on these sections in the courts below.

dant Zenith Associates, Inc., a private employment agency subject to regulation by the Division of Private Employment Agencies. Petitioners Walker, Moore and Staples (respectively, Governor of Illinois, Director of the Illinois Office of Special Investigations ("OSI")*, and an investigator in OSI) were acting pursuant to and under color of the laws of the State of Illinois.

During April through July, 1974, Maros and Scully complained to Walker, Moore and Staples that plaintiffs "had abused their powers as employees of the State of Illinois, and had threatened and harassed [Maros and Scully] illegally and wrongfully for the purpose of aiding a person formerly employed by Defendant Zenith." (Counts III and IV, ¶13.) "On or about July 16, 1974, Defendant Walker, at the recommendation and urging of defendants Moore and Staples, discharged plaintiffs herein from their position as employees of the State of Illinois, and at the time of said discharge, issued documents in the form of press releases stating that plaintiffs had been guilty of illegal acts and abuse of their power as employees of the State of Illinois, including [the same charges made by Maros and Scully]." (Complaint, ¶7.)

The press releases (attached to the complaint as Exhibits A, B and C) are entitled "NEWS FROM THE OFFICE OF THE GOVERNOR" and are reprinted here as Appendices 6, 7 and 8. (App. 20-25.) Each bears the Seal of the

* The Illinois Office of Special Investigations is an executive department office whose functions are to investigate reports of alleged misconduct in office by executive department officers and employees, and to make recommendations as to disciplinary action. See, Executive Order No. 4, dated March 21, 1974, reprinted at App. 18-19.

State of Illinois, and contains the name, address and telephone number of the Illinois Information Service, a branch of the Illinois Department of General Services which publishes bulletins regarding activities of the state government. *See,* Ill.Rev.Stat. (1975) Ch. 127, §§63b13 and 63b13.5.

Plaintiffs allege that the charges made against them by Maros and Scully, investigated by Moore and Staples, and caused to be published in press releases by Walker, were false and defamatory, and were known to be so by defendants, and that Walker and Moore repeated the charges in news conferences. Plaintiffs allege that they received neither a hearing nor a statement of reasons prior to their discharge and the simultaneous public announcements. Plaintiffs do not allege, however, that they requested a hearing, and they did not seek temporary or preliminary injunctive relief with respect to either reinstatement or the holding of a hearing.

All four counts of the complaint arise from these alleged facts. In Counts II and IV, each plaintiff seeks $1,000,000 in damages from each Petitioner (Count II) and from each "private" defendant (Count IV) on a common law defamation theory. In Counts I and III, plaintiffs seek to raise the same defamation theory to a constitutional level by arguing that they were deprived of a liberty interest protected by 42 U.S.C. §1983 because the alleged defamation occurred in connection with their discharge from non-tenured employment. Count I is directed toward Walker, Moore and Staples only; Count III is directed toward all six defendants on a conspiracy theory. In those counts plaintiffs seek $1,000,000 in damages from each defendant, and request injunctive relief in the form of reinstatement to their public offices.

The Ruling Of The District Court

The District Court dismissed the complaint as to petitioners Walker, Moore and Staples on the grounds that "these public officials are protected by the absolute privilege enunciated in *Barr* v. *Matteo,* 360 U.S. 564 (1959), from liability for monetary damages under Sec. 1983 for the alleged defamatory statements made in the course of their official duties," and upon the further finding that plaintiffs had "failed to allege a sufficient violation of their liberty interests to state a claim upon which equitable relief can be granted." (App. 11.) Thereafter, the District Court granted the "private" defendants' motion for judgment on the pleadings. Plaintiffs appealed both orders.

The Unemployment Compensation Hearings And Decisions

Meanwhile, plaintiffs had applied for benefits under the Illinois Unemployment Compensation Act. Their claims were denied by the Unemployment Compensation Claims Adjudicator because plaintiffs had been discharged for misconduct connected with their work.* Plaintiffs then appealed the Claim Adjudicator's determinations to a Referee, and extended hearings were held to determine whether plaintiffs had been discharged for misconduct in office. Plaintiffs were represented by counsel at the hearings, and they testified, as did defendants Maros and

* An individual who has been "discharged for misconduct connected with his work" is ineligible for unemployment compensation benefits for the week in which he has been discharged, and he continues to be ineligible thereafter until he is either no longer unemployed or until six weeks have elapsed since he filed his claim, whichever occurs first. Ill.Rev.Stat. 1975, Ch. 48, §432A (Section 602A of the Illinois Unemployment Compensation Act).

Scully and other witnesses. Five days after the District Court dismissed the complaint as to petitioners, the Referee of the Illinois Division of Unemployment Compensation entered administrative decisions affirming the Claims Adjudicator's finding that plaintiffs were guilty of the charges of misconduct in office announced by Governor Walker. These rulings are reprinted as Appendices 3 and 4. (App. 12-16.)*

The Court of Appeals' Decision

The Court of Appeal characterized the §1983 issue as follows (App. 4):

> "The most serious issue for resolution under Count I is whether Colaizzi and Indovina were deprived of a constitutionally protected liberty interest when Governor Walker issued the press releases without giving them notice or an opportunity to be heard."

The Court ruled that the statements in the press release charged sufficiently reprehensible conduct so as to impugn plaintiffs' reputations, and that the charges thus fell within the language of *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971):

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

The Seventh Circuit recognized that stigma to reputation, without more, does not infringe upon a liberty inter-

* Under the Unemployment Compensation Act, plaintiffs were entitled to appeal the Referee's decisions to the Unemployment Compensation Board of Review, then through the state courts pursuant to the Illinois Administrative Review Act. (Ill.Rev.Stat. 1975, Ch. 48, §§ 471, 473, 520). They have not pursued further appeals.

est protected by Fourteenth Amendment due process safeguards, *Paul* v. *Davis*, 424 U.S. 693, 712 (1976), but relied upon *dictum* in *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972), to hold (App. 7):

> ". . . stigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not necessarily involving deprivation of property as defined in the Fourteenth Amendment) may nevertheless when found *in conjunction* state a claim under 42 U.S.C. §1983 for deprivation of a Fourteenth Amendment liberty interest without due process." (Italics in original.)

Petitioners requested that the Court of Appeals take judicial notice of the administrative hearings and determinations, on the grounds that (i) the hearings afforded plaintiffs an adequate opportunity to clear their names; (ii) plaintiffs are bound by the administrative findings; and (iii) the hearings afforded due process as in *Arnett* v. *Kennedy*, 416 U.S. 134, 157 (1974). The Court of Appeals declined to determine the impact of the hearings and findings because the District Court had not considered these matters (the decisions were rendered after the District Court had dismissed the Complaint as to Walker, Moore and Staples). (App. 10.)

The Court of Appeals reversed the District Court's orders, except that the dismissal of Count II (common law defamation) as to Walker and Staples was affirmed based upon the Illinois common law doctrine of absolute immunity of public officials.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT

A.

The Governor's Announcement Of The Reasons For His Official Actions Are Absolutely Privileged And Cannot Form The Basis For A Federal Civil Rights Suit

The Seventh Circuit's decision — which allows discharged non-tenured public employees to sue the Governor of Illinois for his public announcement of the reasons for his decision to discharge them—conflicts with this Court's decisions in *Barr* v. *Matteo*, 360 U.S. 564 (1959), and *Paul* v. *Davis*, 424 U.S. 693 (1976).

In *Barr*, the Acting Director of the Office of Rent Stabilization issued an allegedly defamatory press release in which he gave reasons as to why he intended to suspend two of his subordinates from duty. The subordinates sued for money damages, alleging that the press release had defamed them and that its publication and terms had been actuated by malice on the part of the Acting Director. The Acting Director's asserted defenses of absolute and qualified privilege were overruled by the trial court.

This Court held that the Acting Director's plea of absolute privilege in defense of the alleged libel was valid (360 U.S. at 574-75):

> "We think that under these circumstances a publicly expressed statement of the position of the agency head, announcing personnel action which he planned to take in reference to the charges so widely disseminated to the public, was an appropriate exercise of the discre-

> tion which an officer of [the Acting Director's] rank must possess if the public service is to function effectively . . . . That [the Acting Director] was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." (Italics in original; footnote deleted.)

This Court said that "[T]he fact that the action here taken was within the outer perimeter of [the Acting Director's] line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint." (360 U.S. at 575.)

In the case at bar, plaintiffs seek to circumvent the common law absolute immunity of the Governor,* by attempting to boost to constitutional level claims which are practically identical to those asserted in *Barr* v. *Matteo*. The Seventh Circuit's decision, reversing the District Court's dismissal of the Section 1983 counts as to petitioners, is in direct conflict with the policy of *Barr* v. *Matteo*.

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* The Supreme Court of Illinois has recently afforded the Governor the same absolute privilege against defamation claims based upon Illinois common law arising out of public statements which this Court gives to federal officials. *Blair* v. *Walker*, 64 Ill. 2d 1, 10 (1976). In *Blair*, however, the plaintiffs were private citizens and not appointed subordinates of the Governor. (64 Ill. 2d at 3-4.)

In the case at bar, the Seventh Circuit recognized the Illinois common law absolute privilege by affirming dismissal of Count II as to Walker and Staples (App. 9), but ruled that that privilege was inapplicable in a Section 1983 action. *Compare Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976) ("[Section] 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.")

Although *Barr* v. *Matteo* was a common law defamation action and not a Due Process case, this Court has recently relied on it to establish that the interest allegedly injured there—reputation—is not protected by due process safeguards. In *Paul* v. *Davis*, 424 U.S. 693 (1976), this Court rejected the very contention which plaintiffs now assert—that discharged, non-tenured public employees may state a constitutional claim against their superior officer for his public explanation of his reasons for discharging them (424 U.S. at 707):

> "It is noteworthy that in *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), and *Howard* v. *Lyons*, 360 U.S. 593, 79 S.Ct. 1331, 3 L.Ed.2d 1454 (1959), this Court had before it two actions for defamation brought against federal officers. But in neither opinion is there any intimation that any of the parties to those cases, nor any of the Members of this Court, had the remotest idea that the Due Process Clause of the Fifth Amendment might itself form the basis for a claim for defamation against federal officials."

In the case at bar, the Seventh Circuit has allowed plaintiffs to proceed with a claim for defamation under the guise of a federal civil rights suit. This is contrary to both the common law doctrine of absolute immunity, and to the limitations placed this year upon suits under Section 1983 in *Paul* v. *Davis*.

B.

Even If Plaintiffs' Liberty Interests Were Implicated By The Governor's Statements, Plaintiffs Received Due Process In The Form Of Post-Discharge Administrative Hearings.

The Seventh Circuit's decision in this case also conflicts with the decision of this Court in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). There Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, rejected the conten-

tion that a constitutionally protected liberty interest is implicated by hearings which occur after a government employee is dismissed on charges of dishonesty. Mr. Justice Rehnquist said (416 U.S. at 157):

> "But that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an *unsupported* charge which could *wrongfully* injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person an 'opportunity to clear his name', a hearing afforded after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." (Emphasis added.)

Here, the administrative decisions of the Division of Unemployment Compensation (App. 12-16) reveal both that plaintiffs received "an opportunity to clear [their] names" shortly after their dismissal, and that the charges made against them were neither "unsupported" nor "wrongful". These administrative determinations establish that plaintiffs have alleged no deprivation of a constitutionally protected liberty interest, and that even if this were not the case, plaintiffs have been afforded post-discharge hearings which are adequate under the Due Process Clause.

II.

FEDERAL COURT REVIEW OF PUBLIC STATEMENTS AND PERSONNEL DECISIONS BY THE CHIEF EXECUTIVE OFFICER OF THE STATE RAISES IMPORTANT AND NOVEL QUESTIONS UNDER THE FIRST AND FOURTEEN AMENDMENTS

In *Bishop* v. *Wood*, ... U.S. ...., 96 S.Ct. 2074, 2080 (1976), this Court held that the truth or falsity of reasons given for a non-tenured public employee's discharge "neither enhances nor diminishes [the employee's] claim that his constitutionally protected interest in liberty has been impaired." This Court went on to say (..... U.S. at ....., 96 S.Ct. at 2080):

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies . . . . In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways."

In this case, plaintiffs make no contention that their discharge was motivated by a desire to penalize exercise of their constitutional rights, and the administrative determinations (App. 12-16) reveal the validity of the presumption that the official action here in question was regular.

The injunctive relief requested by plaintiffs—reinstatement to their non tenured positions—raises major questions in terms of the delicate relationship between federal courts and the internal disciplinary affairs of the executive branch of state governments. *Compare Stefanelli* v. *Menard*, 342 U.S. 117, 120 (1951); *Rizzo* v. *Goode*, 423 U.S. 362, 378-380 (1976). Under the Illinois Constitution (Art. V, §§ 8-11), the Governor is responsible for the faithful execution of the laws by his subordinates, and for organizing and manning the executive departments which enforce them. He had the unqualified right to remove plaintiffs at will. Ill.Const. Art. V, §10; *see Adams* v. *Walker*, 492 F.2d 1003, 1004-7 (7th Cir. 1974). Injunctive intervention by the federal court in this situation not only substantially alters the powers conferred on the Governor by the state constitution, but also requires a senseless result. Surely once plaintiffs were reinstated, the Governor would have a duty to remove them again because their misconduct

in office has been proved in statutory administrative proceedings.*

Beyond the question of federal court intrusion into state personnel decisions and the related question of impropriety of injunctive relief, this case raises substantial questions under the First Amendment. As Justice Black stated in his concurring opinion in *Barr* v. *Matteo*, 360 U.S. 564, 577 (1959):

> "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important."

The Seventh Circuit has imposed a constitutional requirement under the Fourteenth Amendment that the Governor must hold a hearing before he informs his constituents of the reasons for his firing of two public officeholders who have been found to have violated their public trust. This holding disregards the public's First Amendment interests in having a responsive chief state executive. Existence of a possible monetary damage remedy should the federal court disagree with official statements of the Governor would act as a further restraint on forthright governmental communication.

Under the Seventh Circuit's analysis, these First Amendment considerations were not even considered. This Court

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* *Edelman* v. *Jordan*, 415 U.S. 651, 662-63 (1974) forecloses the federal court from awarding plaintiffs back pay from the State ancillary to their claim for reinstatement.

should review this case to determine the appropriate balance between unfettered political discussion under the First Amendment on one hand and the role of the federal courts under 42 U.S.C. §1983 on the other.

Conclusion

For the foregoing reasons petitioners respectfully pray that this Court grant a writ of certiorari to review the judgment of the Seventh Circuit in this case.

Respectfully submitted,

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December 8, 1976

APPENDIX

APPENDIX 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-2060

SAMUEL COLAIZZI and SAMUEL INDOVINA,
Plaintiffs-Appellants,

v.

DANIEL WALKER, Governor, State of Illinois, DONALD PAGE MOORE, Director, Office of Special Investigations, State of Illinois, LAURI STAPLES, THEODORE MAROS, RAMON SCULLY and ZENITH ASSOCIATES, INC., an Illinois Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 74-C-2130
WILLIAM J. LYNCH, *Judge*

Argued February 26, 1976—Decided September 14, 1976

Before FAIRCHILD, *Chief Judge*, SWYGERT, *Circuit Judge*, and STECKLER, *District Judge.**

FAIRCHILD, *Chief Judge.* The principal issue for decision in this case is whether defendant Walker's assertions

* Chief District Judge William E. Steckler of the Southern District of Indiana is sitting by designation.

in a press release, that plaintiffs abused their official positions in attempting to force a company under their supervision to drop criminal actions against an employee, deprived plaintiffs of a liberty interest protected by the Fourteenth Amendment. Plaintiffs Samuel Colaizzi and Samuel Indovina appeal from orders of the district court dismissing their claims against several of the defendants, and granting judgment on the pleadings to the rest of the defendants.

At the time of the incident that gave rise to this case, Colaizzi was Superintendent of the Division of Private Employment Agencies of the Illinois Department of Labor, and Indovina was an investigator for that Division. The allegations in the complaint, which we must take to be true on this appeal, state that on or about July 16, 1974, defendant Walker, Governor of Illinois, discharged them from their positions, and simultaneously issued or caused to be issued certain press releases.[1] The complaint alleges

[1] The principal release reads as follows:

"CHICAGO, ILL., July 16—Gov. Dan Walker today (Tuesday) announced the dismissal of Samuel V. Colaizzi, Superintendent of the Division of Private Employment Agencies, Illinois Department of Labor, and Samuel Indovina, an inspector in Mr. Colaizzi's division.

"The Governor's action was taken on the recommendation of Donald Page Moore, Director of Special Investigations.

"Moore's investigation has revealed misconduct by Messrs. Colaizzi and Indovina with reference to Zenith Associates, an employment agency with offices in Chicago, Elmwood Park and Des Plaines, Illinois.

"In October 1973, the owners of Zenith discovered substantial evidence tending to show that one of their employees had surreptitiously taken more than $4,000 in Zenith receipts. They fired the employee, turned the evidence over to the State's Attorney for prosecution, and commenced efforts to obtain reimbursement from the former employee.

"In January, 1974, Colaizzi and Indovina intervened on behalf of the discharged Zenith employee. With careful circumlocution, they repeatedly urged Zenith's owners to 'consider' dropping or reducing their criminal and civil claims. At the same time, they made it unmistakably clear that if (but *only* if) the owners refused to 'cooperate' in this report, Colaizzi would file a series of administrative charges against Zenith alleging various regulatory violations which, if proved, might justify suspension or revocation of Zenith's right to do business.

"Since Colaizzi proposed to appoint himself as the hearing officer to adjudicate the merit of his own charges, his threat was an extremely serious one.

"Zeniths owners consulted counsel and refused to 'cooperate.' Colaizzi, assisted by Indovina, immediately filed a series of extraordinary Department of Labor charges against Zenith, then appointed himself hearing officer, then abandoned the charges after a stormy hearing, then subjected all Zenith's offices to simultaneous inspections by his investigators, then caused Zenith's owners to be arrested by police officers for allegedly operating an office without a license, then abandoned those criminal charges, then filed a new set of administrative charges, conducted new hearings with respect to a few of the new charges, and, finally, suspended Zenith's officers from acting as employment counselors for a three-day period."

A statement announcing the appointment of Colaizzi's successor was issued the same date. In it the Governor stated that Colaizzi and Indovina "attempted to use the power of their office to force a company under their supervision to drop possible criminal actions against an employee." The statement implied that they were "bad apples" among the state's employees.

the charges in these releases were made without notice or opportunity to be heard.

The complaint alleges jurisdiction based on 28 U.S.C. §§ 1331 and 1343; 42 U.S.C. §§ 1981, 1983, and 1985; and the Fourteenth Amendment. Count I seeks damages and injunctive relief against Governor Walker; Donald Page Moore, Director of the Office of Special Investigations of

the State of Illinois; and Lauri Staples, an employee of the Office of Special Investigations. Count II is a pendent state law claim against these three defendants for defamation. Count III alleges a conspiracy among defendants Theodore Maros and Ramon Scully, employees of Zenith Associates, Inc., an Illinois private employment agency, and defendants Walker, Moore and Staples. Finally, Count IV of the complaint sets out a pendent state law claim for defamation against Maros, Scully, and Zenith. Defendants are alleged to have known the charges were false.

The district court dismissed the complaint as it related to defendants Walker, Moore and Staples (Counts I, II and III) for failure to state a claim, and granted judgment on the pleadings to defendants Zenith Associates, Maros, and Scully (on Counts III and IV).

We agree that the complaint stated no cause of action based on 42 U.S.C. §§ 1981 and 1985. No racial or otherwise class-based invidiously discriminatory animus is alleged. See *Runyon* v. *McCrary,* 44 U.S.L.W. 5034 (U.S., June 25, 1976) (§1981); *Griffin* v. *Breckenridge,* 403 U.S. 88, 102 (1971) (§1985). Appellant's boiler-plate pleading fails to state a claim under these statutes.

The most serious issue for resolution under Count I is whether Colaizzi and Indovina were deprived of a constitutionally protected liberty interest when Governor Walker issued the press releases without giving them notice or opportunity to be heard. It is important at this juncture to note that plaintiffs do not allege a *property* interest in their jobs such that mere termination without more would have required procedural due process safeguards. *Compare Board of Regents* v. *Roth,* 408 U.S. 564, 576-78 (1972) with *Perry* v. *Sindermann,* 408 U.S. 593, 599-603 (1972). Nor do plaintiffs allege that they were discharged as a penalty for the exercise of any constitutional right. The issue is whether Governor Walker's published allegations under the circumstances of this case deprived plaintiffs of a liberty interest without due process.

In *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971), the Supreme Court stated:

> Yet, certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play. [Citation omitted.] '[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. [Citation omitted.]
>
> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.

The charges contained in the press release allegedly issued by Governor Walker charged sufficiently reprehensible conduct so as to impugn the good name and reputation of Colaizzi and Indovina, and thus appear to fall squarely within the language of *Constantineau. Board of Regents* v. *Roth,* 408 U.S. 564 (1972) provides further guidance on the issue. In *Roth,* 408 U.S. at 573, the Court cited *Constantineau,* and said that had the decision not to rehire Roth been grounded on charges of immorality or dishonesty, notice and an opportunity to be heard would have been required.

Based on *Constantineau* and *Roth,* and on our own decision in *Adams* v. *Walker,* 492 F.2d 1003, 1007-1008 (7th Cir. 1974), we have no difficulty in holding that the district court erred in this case in dismissing the Count I, under §1983, for failure to state a claim.

Since oral argument appellants have cited *Paul* v. *Davis,* 44 U.S.L.W. 4337 (U.S., March 23, 1976). There the Supreme Court held that the infliction by the state of a stigma

on one's reputation, without more, does not infringe upon a liberty interest protected by Fourteenth Amendment due process safeguards. *Paul* v. *Davis* neither overruled *Constantineau* nor disavowed the dictum in *Roth*, and we deem it distinguishable here.

In *Paul* v. *Davis*, a photograph of plaintiff-respondent, bearing his name, was included on a printed flyer of so-called "active shoplifters," and was circulated by two chiefs of police to Louisville, Kentucky merchants during the Christmas shopping season. In fact, respondent Davis had been arrested for but not convicted of shoplifting. After the charge giving rise to his inclusion on the flyer had been dismissed, Davis brought a §1983 action against the police chiefs, alleging that the stain on his reputation resulting from the circulation of the flyer had deprived him of liberty without due process of law.

The Supreme Court held that these facts failed to state a claim for relief under 42 U.S.C. §1983. In so holding, the Court stated:

> The words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts this line of cases does not establish the proposition that reputation alone, *apart from some more tangible interests such as employment*, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause. *Paul* v. *Davis, supra*, 44 U.S.L.W. at 4340. [Emphasis added.]

As we read *Paul* v. *Davis*, stigma to one's reputation, inflicted by the state, is not of itself a deprivation of liberty within the meaning of the Fourteenth Amendment. The

Court distinguished the *Roth* dictum in the following language:

> While *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a governmental official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment:
>
> 'The state *in declining to rehire the respondent*, did not make any charge against him that might seriously damage his standing and associations in his community . . .
>
> 'Similarly, there is no suggestion that the State, *in declining to re-employ the respondent*, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. 408 U.S., at 573 (emphasis supplied.) Thus it was not thought sufficient to establish a claim under §1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment. Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee. *Paul* v. *Davis*, 44 U.S.L.W. at 4342 (emphasis in original).

In other words, infliction of a stigma to reputation accompanied by a failure to rehire (or, *a fortiori*, by a discharge) states a claim for deprivation of liberty without due process within the meaning of the Fourteenth Amendment. Moreover, this combination of stigma plus failure to rehire/discharge states a claim even if the failure to rehire or discharge of itself deprives the plaintiff of no property interest within the meaning of the Fourteenth Amend-

ment. We reach this conclusion because on the facts of *Roth* itself the Supreme Court found that the plaintiff respondent had no claim of entitlement to, or property interest in his job. *Roth, supra,* 408 U.S. at 578. Since the Court in *Paul* v. *Davis* specifically approved the *Roth* dictum concerning stigma to reputation, it follows that stigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not necessarily involving deprivation of property as defined in the Fourteenth Amendment) may nevertheless when found *in conjunction* state a claim under 42 U.S.C. §1983 for deprivation of a Fourteenth Amendment liberty interest without due process.

The case at bar clearly involves a claim of stigma plus discharge. It cannot seriously be contended that the charges contained in the press releases did not gravely stigmatize the reputation of Colaizzi and Indovina. *Cf. Adams* v. *Walker,* 492 F.2d 1003, 1007-1008 (7th Cir. 1974). At the same time, the two men were discharged from their state positions, albeit positions in which they held no property interest within the meaning of the Fourteenth Amendment.

The district court also dismissed Count II, plaintiffs' pendent state law claim against Walker, Moore, and Staples, for defamation. The state and federal law claims arose from a common nucleus of operative fact, and there is sufficient substance in the federal claim so that the district court could take jurisdiction of the state law claim. *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 725 (1966). The district court deemed all three officials protected by absolute privilege. Since oral argument here, the Supreme Court of Illinois decided *Blair* v. *Walker,* ..... Ill. .... N.E.2d ..... (May 28, 1976), holding in a sufficiently similar case that in Illinois the Governor

is protected by an absolute privilege. Appellants concede an absolute immunity of public officials in Illinois as to communications passing between public officials pertaining to their official duties. Anything alleged against Staples falls within such immunity. As to Moore, however, it is alleged that he repeated the charges in news conferences, thus going beyond inter-official communication. Moore was director of the Office of Special Investigations. It does not clearly appear as a matter of law that he was so high an executive officer of the state or that public announcement by him, in addition to informing the Governor of his findings, was so clearly a matter of his official duty, that the doctrine of *Blair* would support absolute immunity. Further inquiry into the circumstances by the district court will be necessary to decide this question, as well as whether he acted in good faith, if he had only a qualified privilege. We therefore affirm as to Walker and Staples, but must reverse as to Moore.

Count III of the complaint alleges a conspiracy among all defendants to make false charges for the purpose of removing plaintiffs from their state employment. This allegation of action by persons acting under color of law to carry out a purpose in which both state officials and private persons joined states a claim under 42 U.S.C. §1983. See *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144 (1970).

The district court could properly entertain Count IV, the state law claims of defamation against defendants Scully, Maros, and Zenith, pendent to Count III. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 725 (1966).

While we hold that the complaint states a §1983 claim against defendant Walker, Moore and Staples, we do not mean to imply that a qualified good-faith immunity may not be available to them. See *Wood* v. *Strickland,* 420 U.S.

308 (1975); *Scherer* v. *Rhodes*, 416 U.S. 232 (1974). If properly pleaded, the district court will have to resolve this issue.

Immunity aside, defendants may be able to establish the truth of the charges made.

On this appeal, defendants have asked us to take judicial notice of the findings made in hearings on plaintiffs' claims for unemployment compensation resulting from their discharge. The hearings referee denied benefits, finding that plaintiffs had each been guilty of misconduct in connection with the Zenith matter. These findings were made at about the same date as the earlier of the decisions of the district court, and were not put before it. Defendants argue that the hearings presented an opportunity to plaintiffs to clear their names; that plaintiffs are bound by the findings; and that the hearings afforded due process as in *Arnett* v. *Kennedy*, 416 U.S. 134, 157 (1974).

Because these theories were not presented to nor inquired into in the district court, we decline to determine the impact, if any, of the unemployment compensation hearings and the findings which resulted. On remand, defendants will have an opportunity to present this material and to urge that it be considered in the light of the issues posed by the pleadings.

The orders appealed from are reversed except that the dismissal of Count II as to defendants Walker and Staples is affirmed. The cause is remanded for proceedings consistent with this opinion.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

UNITED STATES DISTRICT COURT

Northern District of Illinois—Eastern Division

Name of Presiding Judge, Honorable William J. Lynch
Cause No. 74 C 2130 Date: December 19, 1974

Title of Cause— *SAMUEL COLAIZZI, et al* v. *DANIEL WALKER, et al.*

The motion to dismiss Counts I, II and III of the Complaint on behalf of defendants Walker, Moore and Staples, is hereby granted. The Court finds that these public officials are protected by the absolute privilege enunciated in *Barr* v. *Matteo*, 360 U.S. 564 (1959) from liability for monetary damages under Sec. 1983 for the alleged defamatory statements made in the course of their official duties. *See Pierson* v. *Ray*, 386 U.S. 547 (1967). Further, the Court finds that the plaintiff has failed to allege a sufficient violation of their liberty interests to state a claim upon which equitable relief can be granted. *See Adams* v. *Walker*, 492 F.2d 1003, 1007-08 (7th Cir. 1973). A draft Order will follow.

/s/ *Lynch*, J.

APPENDIX 3

STATE OF ILLINOIS — DEPARTMENT OF LABOR
BUREAU OF EMPLOYMENT SECURITY
DIVISION OF UNEMPLOYMENT COMPENSATION
REFEREE'S DECISION

IN THE MATTER OF:
APPEAL DOCKET NO. AR. 74 C 29320
CLAIMANT:
Appellant—Samuel V. Colaizzi
8616 West Grand Avenue
River Grove, Illinois 60171

SOCIAL SECURITY NO.: 359 18 4220
DATE FILED IN L.O.: September 17, 1974
EMPLOYER:
Respondent—Kenneth Holland
Director of Labor
State of Illinois
160 N. LaSalle Street
Chicago, Illinois 60601

HEARING DATES: Nov 20, 1974; Nov 27, 1974; Dec 9, 1974
PLACE OF HEARING: Chicago, Illinois
DATE OF MAILING: Dec 24 1974
SECTION OF THE UNEMPLOYMENT COMPENSATION ACT INVOLVED: Section 602A—Misconduct.

This matter arises under Section 602A of the Unemployment Compensation Act. The issue is whether or not

the claimant was discharged from his employment with the State of Illinois for misconduct connected with the work.

The appeal from the determination of the Claims Adjudicator was for the purpose of the hearing, consolidated with the consent of the parties with the appeal of Mr. Sam R. Indovino, Docket No. AR 74 C 29226. Both the claimant and the respondent were represented by counsel.

The claimant was discharged from his employment as Superintendent in the Illinois Department of Labor, Division of Private Employment Agencies, on July 16, 1974.

Comprehensive and exhaustive testimony and numerous exhibits presented at the hearing established that the claimant exceeded his authority in attempting to prevail upon Zenith Associates, Inc., a private employment agency to refrain from pursuing action against one of its former employees, who had allegedly misappropriated funds from company receipts. The claimant had informed Zenith Associates, Inc., that unless it dropped action against that employee, several actions would be instituted against it by the Division of Private Employment Agencies. Upon Zenith Associates, Inc. failure to drop action, the claimant through his subordinate, undertook steps which resulted in the suspension of the operations of Zenith Associates, Inc.

The actions of the claimant exceeded the scope of his employment and authority as Superintendent of the Division of Private Employment Agencies, and constituted misconduct connected with the work.

After considering all available evidence in connection with this appeal, the Hearings Referee affirms the deter-

mination of the Claims Adjudicator and benefits are denied for the following period covered by this appeal: From July 28, 1974 through September 7, 1974.

/s/ *Ralph M. Finkel*
Ralph M. Finkel
Hearings Referee

RIGHT OF FURTHER APPEAL:

This decision will become final, unless written notice of appeal from the decision is filed within ten (10) days from the date of mailing as shown above. The notice of appeal must be filed at the local unemployment compensation office where the claim is filed or with the Board of Review. Information relative to appeals and forms may be had upon application to the local unemployment compensation office.

APPENDIX 4

STATE OF ILLINOIS—DEPARTMENT OF LABOR
BUREAU OF EMPLOYMENT SECURITY
DIVISION OF UNEMPLOYMENT COMPENSATION
REFEREE'S DECISION

IN THE MATTER OF:
APPEAL DOCKET NO. AR. 74 C 29226
CLAIMANT:
Appellant—Sam R. Indovino
260 Harmony Lane
Elk Grove, Illinois 60007

SOCIAL SECURITY NO:
351 24 4018
DATE FILED IN L.O.:
September 16, 1974
EMPLOYER:
Respondent—Kenneth Holland
Director of Labor
State of Illinois
160 North LaSalle Street
Chicago, Illinois 60601

HEARING DATES: Nov 20, 1974; Nov 27, 1974; Dec 9, 1974
PLACE OF HEARING: Chicago, Illinois
DATE OF MAILING: Dec 24 1974
SECTION OF THE UNEMPLOYMENT COMPENSATION ACT INVOLVED: Section 602A—Misconduct.

This matter arises under Section 602A of the Unemployment Compensation Act. The issue is whether or not the claimant was discharged from his employment with the State of Illinois for misconduct connected with the work.

The appeal from the determination of the Claims Adjudicator was for the purpose of the hearing, consolidated

with the consent of the parties with the appeal of Mr. Samuel V. Colaizzi, Docket No. AR 74 C 29320. Both the claimant and the respondent were represented by counsel.

The claimant was discharged from his employment as an investigator in the Illinois Department of Labor, Division of Private Employment Agencies, on July 16, 1974.

Comprehensive and exhaustive testimony and numerous exhibits presented at the hearing establish that the claimant undertook a course of conduct, which resulted in the suspension of the operators of Zenith Associates, Inc., a private employment agency, upon the instructions of his supervisor, Mr. Samuel V. Colaizzi, and with the knowledge that his supervisor was exceeding his authority in issuing said instructions.

The actions of the claimant, under these circumstances constitute misconduct in connection with the work.

After considering all available evidence in connection with this appeal, the Hearings Referee affirms the determination of the Claims Adjudicator and benefits are denied for the following period covered by this appeal: From August 4, 1974 through September 14, 1974.

/s/ *Ralph M. Finkel*
Ralph M. Finkel
Hearings Referee

RIGHT OF FURTHER APPEAL:
This decision will become final, unless written notice of appeal from the decision is filed within ten (10) days from the date of mailing as shown above. The notice of appeal must be filed at the local unemployment compensation office where the claim is filed or with the Board of Review. Information relative to appeals and forms may be had upon application to the local unemployment compensation office.

APPENDIX 5

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

The Civil Rights Act (42 U.S.C. §1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Article V of the Constitution of Illinois provides in pertinent part:

> §8. Governor—Supreme Executive Power
>
> The Governor shall have the Supreme executive power, and shall be responsible for the faithful execution of the laws.
>
> §10. Governor—Removals
>
> The Governor may remove for incompetence, neglect of duty, or malfeasance in office any officer who may be appointed by the Governor.

Executive Order Number 4 (filed in the Office of the Secretary of State of the State of Illinois on March 21, 1974) provides:

EXECUTIVE ORDER

State government now employs some 120,000 persons and spends over six billion dollars of taxpayers' funds each year. The Executive Branch under the Governor employs almost half those people and is responsible for approximately one-half of those expenditures.

In any operation of this size, instances of conflicts of interest, malfeasance and misfeasance are almost inevitable. Constant vigilance is required.

Because the Governor is ultimately responsible for the conduct of the business of his office and the executive agencies reporting to him, he has a duty to insure that corruption and misconduct within the Executive Branch be discovered, investigated, and, where possible, prosecuted. The Governor should, in addition, take action to deter and to limit or foreclose opportunities for such conduct in the future.

Other elected officials of state and local government have their own legitimate investigative and prosecutorial responsibilities concerning misconduct by state officials. But this cannot shield the Governor from his own concurrent duty to safeguard the integrity of the Executive Branch by appropriate affirmative action. In discharging this responsibility, there must be respectful adherence to legal and constitutional rights guaranteed to each individual.

Accordingly, I hereby order:

1. There is created in the Office of the Governor an Office of Special Investigations.
2. This agency shall have a Director who shall be appointed by the Governor. The Director shall appoint such other personnel, including investi-

gators, as may be necessary to carry out the duties of the office.

3. The Office shall:
   (a) Conduct inquiries and investigations of instance of criminal corruption, conflicts of interest, malfeasance and misfeasance of any officer or employee of any executive department or agency subject to the Governor;
   (b) Prepare cases, where proper, for referral to an appropriate prosecutorial agency;
   (c) Make recommendations for disciplinary action;
   (d) Develop and implement policies, plans and programs to enforce the law and deter and prevent misconduct of the types specified above;
   (e) Accept and expend funds, grants and services from the federal government, or its agencies, or the Illinois Law Enforcement Commission.
4. This Executive Order takes effect upon filing with the Secretary of State and shall remain in full force and effect unless amended or revoked by Executive action.

March 21, 1974
Springfield, Illinois

/s/ *Daniel Walker*
Daniel Walker
Governor

APPENDIX 6

(Seal of State of Illinois)

NEWS FROM THE OFFICE OF THE GOVERNOR

FOR IMMEDIATE RELEASE

CHICAGO, Ill., July 16—Gov. Dan Walker today (Tuesday) announced the dismissal of Samuel V. Colaizzi, Superintendent of the Division of Private Employment Agencies, Illinois Department of Labor, and Samuel Indovina, an inspector in Mr. Colaizzi's division.

The Governor's action was taken on the recommendation of Donald Page Moore, Director of Special Investigations.

Moore's investigation has revealed misconduct by Messrs. Colaizzi and Indovina with reference to Zenith Associates, an employment agency with offices in Chicago, Elmwood Park and Des Plaines, Illinois.

In October 1973, the owners of Zenith discovered substantial evidence tending to show that one of their employees had surreptitiously taken more than $4,000 in Zenith receipts. They fired the employee, turned the evidence over to the State's Attorney for prosecution, and commenced efforts to obtain reimbursement from the former employee.

In January, 1974, Colaizzi and Indovina intervened on behalf of the discharged Zenith employee. With careful circumlocution, they repeatedly urged Zenith's owners to "consider" dropping or reducing their criminal and civil claims. At the same time, they made it unmistakably clear that if (but *only* if) the owners refused to "cooperate" in this respect, Colaizzi would file a series of administrative charges against Zenith alleging various regulatory violations which, if proved, might justify suspension or revocation of Zenith's right to do business.

Since Colaizzi proposed to appoint himself as the hearing officer to adjudicate the merit of his own charges, his threat was an extremely serious one.

Zenith's owners consulted counsel and refused to "cooperate." Colaizzi, assisted by Indovina, immediately filed a series of extraordinary Department of Labor charges against Zenith, then appointed himself hearing officer, then abandoned the charges after a stormy hearing, then subjected all Zenith's offices to simultaneous inspections by his investigators, then caused Zenith's owners to be arrested by police officers for allegedly operating an office without a license, then abandoned those criminal charges, then filed a new set of administrative charges, conducted new hearings with respect to a few of the new charges, and, finally, suspended Zenith's officers from acting as employment counselors for a three-day period.

APPENDIX 7
(Seal of State of Illinois)

NEWS FROM THE OFFICE OF THE GOVERNOR

STATEMENT BY GOVERNOR DAN WALKER

July 16, 1974

I am very pleased to announce the appointment of John Riordan as Superintendent of Private Employment Agencies of the Department of Labor.

Mr. Riordan is leaving the Chicago Crime Commission where he served as Chief Investigator for three years and operating director for two years. Before that he was an FBI agent for 26 years.

I have a partiality for people who have worked at the Chicago Crime Commission like Mr. Riordan, like Harvey Johnson, who is now director of the Department of Law Enforcement and who served at the Crime Commission as executive director.

Mr. Riordan replaces Samuel V. Colaizzi, who was fired yesterday as Superintendent along with Samuel Indovina, an inspector in the division.

Donald Page Moore, Director of the Office of Special Investigations, recommended the dismissal of both Mr. Colaizzi and Mr. Indovina on the grounds of misconduct.

Both persons attempted to use the power of their office to force a company under their supervision to drop possible criminal actions against an employee.

I hope that the message goes out loud and clear to all state employees that this kind of activity or any other kind of wrongdoing will not be tolerated. There will always be a few bad apples but the overwhelming number of state

employees, in fact, the overwhelming number of all public employees are dedicated, honest, hard-working people. They are in governmnt to help people.

• • •

case today is an example of why we need the OSI and Donald Page Moore.

For the first time in Illinois, we do have an agency to investigate charges like this one and to root out of government the undesirables.

These are not the first people to be fired, and I am sure there will be more. And what's more, such discharges will be made public.

I want to commend the media and the Better Government Association which first alerted us to certain activities of these two men. The charge then centered around shoddy practices by some employment agencies and the failure of the agency to enforce state laws.

Once into the investigation, however, we discovered these other activities.

Mr. Riordan will receive a full report from Donald Page Moore on the division's activities. Mr. Riordan has instructions to get his agency working to protect people who go to employment agencies for jobs.

I want an honest agency, and I want an agency that enforces the laws.

APPENDIX 8

(Seal of State of Illinois)

NEWS FROM THE OFFICE OF THE GOVERNOR

FOR IMMEDIATE RELEASE

CHICAGO, Ill., July 16—Gov. Dan Walker today (Tuesday) announced the appointment of John Riordan of Chicago Heights as State Superintendent of the Division of Private Employment Agencies, Illinois Department of Labor.

He will assume office July 22.

Riordan replaces Samuel V. Colaizzi, who was fired by Gov. Walker yesterday on the recommendation of Donald Page Moore, director of the Office of Special Investigations.

Riordan, 56, has spent all his adult life in law enforcement starting in 1943 as a special agent of the Federal Bureau of Investigation.

He is presently operating director of the Chicago Crime Commission and a part time instructor in police science at Thornton Community College, South Holland.

Riordan attended Georgetown University's foreign service school. He holds an LL.B. from DePaul University and an M.A. in history, also from DePaul. He served in the Navy as a yoeman during World War II.

Riordan left the FBI in 1969 to join the Chicago Crime Commission, where he was chief investigator for three years before becoming operating director.

He co-authored with Harvey Johnson and Jack Kornfeld the 1970 Study of Organized Crime in Illinois, financed by a grant from the Illinois Law Enforcement Commission.

Riordan and Johnson also headed the staff which compiled the 1969 Spotlight on Legitimate Business and Hoods, Part III, published by the Chicago Crime Commission.

Harvey Johnson is now director of the Illinois Department of Law Enforcement.

Riordan was project director for a series of 1972 Crime Commission seminars financed by the ILEC on cargo losses, gambling, and narcotics traffic.

He was a member of the executive committee and board of directors of the National Association of Citizens Crime Commissions in 1972 and 1973 and is an associate of the International Association of Chiefs of Police.

Riordan was a member of the standing committee on organized crime of the ILEC from 1971 to 1973.

He and his wife Anita Joy have eight children.

Riordan's salary will be $20,000.

No. 76-785

Supreme Court, U. S.
FILED
FEB 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

DANIEL WALKER, Governor of the State of Illinois, DONALD PAGE MOORE, Director, Office of Special Investigations, State of Illinois, and LAURI STAPLES,

Petitioners,

vs.

SAMUEL COLAIZZI, SAMUEL INDOVINA, THEODORE MAROS, RAMON SCULLY, and ZENITH ASSOCIATES, INC., an Illinois Corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Justices of the Supreme Court of the United States:

The Respondents, Samuel Colaizzi and Samuel Indovina, respectfully pray that the Petition for Writ of Certiorari filed herein be denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported officially at 542 F.2d 969 (1976), and is reproduced as Appendix 1 to the Petition for Writ of Certiorari. The opinion of the District Court is not reported and is reproduced as Appendix 2 to the Petition for Writ of Certiorari.

QUESTION PRESENTED

Petitioners have briefed one main question in their Petition for Writ of Certiorari:

Whether a State Governor has the right to make comments accusing untenured public employees of a crime to the public at large in connection with their discharge, without granting them a hearing prior to making such statements.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the Constitutional Provisions and Statutes referred to in the Petition for Writ of Certiorari, the following are pertinent:

The Illinois Constitution of 1970, Article VIII, §4:

> "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

Chapter 48, Illinois Revised Statutes, §640:

> "Except as is hereinafter provided in this Section, information obtained from any individual or employing unit pursuant to the administration of this Act [Unemployment Compensation Act] shall be confidential and shall not be published or be open to public inspection, nor be used in any court in any action or proceeding pending therein, nor be admissible in evidence in any action or proceeding other than one arising out of the provisions of this Act . . . Any officer or employee of the State who, except with authority of the Director pursuant to this Section, shall disclose the same shall be guilty of a Class B misdemeanor; and shall thereafter be disqualified from holding any appointment or employment by the State . . ."

STATEMENT OF THE CASE

The statement of the case as set forth by Petitioners in their Petition is substantially correct. However, in discussing the unemployment compensation hearing and decision regarding these Respondents' claims for unemployment compensation benefits, they have neglected to state that there is nothing in the record of this case to support those assertions. The decision and transcript of the hearing of the unemployment compensation proceeding were never presented to the District Court in this case, and therefore were never considered by the District Court in passing upon this matter. Petitioners requested the Court of Appeals to take judicial notice of those proceedings, by way of supplementing the record on appeal. However, as set forth in the Court of Appeals' decision, that Court declined to do so, and specifically refused to consider "the impact, if any, of the unemployment compensation hearings and the findings which resulted." It is therefore clear that those matters may not be considered in support of this Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH NO DECISION OF THIS COURT.

Contrary to the Petitioners' assertions, this Court has never held that a State official is immune from suit under 42 U.S.C. §1983 for violation of a state employee's rights to due process of law. On the contrary, this Court's decisions have been specifically to the contrary.

The decision in *Barr* v. *Matteo,* 360 U.S. 564 (1959), dealt solely with a suit for defamation. Nothing concerning a cause of action under 42 U.S.C. §1983 was mentioned in that case. Nor could it have been so mentioned, since this Court's decision in *Monroe* v. *Pape,* 365 U.S. 167 (1961), which gave life to 42 U.S.C. §1983 had not yet been decided. The Court of Appeals, as is clear from its decision, followed this Court's decision in *Barr* in affirming the decision of the District Court dismissing the libel counts against Petitioner Walker in this case.

As noted by this Court in *Paul* v. *Davis,* 424 U.S. 693, 96 S.Ct. 1155 (1976), different considerations are present in suits under 42 U.S.C. §1983 than in a suit brought claiming defamation and nothing more. This Court made it clear in that case that a government official who both defames an individual and at the same time deprives him of some right previously held under state law is amenable to suit. The Court started with the language in *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971):

> "While a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

This Court then interpreted that language in this manner:

> "We think that the italicized language in the last sentence quoted, 'because of what the government is doing to him,' referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry. 'Posting,' therefore, significantly altered his status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards. The 'stigma' resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any 'liberty' protected by the procedural guarantees of the Fourteenth Amendment."

The Court then specifically referred to and reaffirmed its holding in *Board of Regents* v. *Roth,* 408 U.S. 564, 92 S.Ct. 2701 (1972), where specific reference was made to a dichotomy between a defamation, standing alone, and a defamation coupled with other action, such as the refusal to rehire or declination to re-employ.

Clearly, *Paul* v. *Davis* stands for the proposition that a defamation by a public official such as a Governor, standing alone, will not give rise to a constitutional violation where no prior hearing has been held, but that where there is action taken in connection with the defamatory statements which alters the individual's status, such a constitutional violation does exist. Clearly the defamatory accusations made against the Plaintiffs-Respondents here not only serve to defame them, but in the words of

this Court in *Roth* "imposed upon [them] a stigma or other disability that foreclosed [their] freedom to take advantage of other employment opportunities." 408 U.S. at 573. To hold otherwise would require a complete overruling of *Roth*.

Nor does anything contained in this Court's recent decision in *Bishop* v. *Wood*, ... U.S. ....., 96 S.Ct. 2074 (1976) lend any credence to Petitioners' argument. The decision that no liberty interest of that Plaintiff had been impinged upon was specifically based upon the fact that there was no dissemination or publication of the reasons for his dismissal:

> "In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honesty, or integrity' was thereby impaired. And since the latter communication was made in the course of a judicial proceeding which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim. A contrary evaluation of either explanation would penalize forthright and truthful communication between employer and employee in the former instance, and between litigants in the latter."

As recognized by the Court of Appeals, however, Governor Walker was not so circumspect. Rather, in what can only be termed the rashest of actions, he suddenly and without warning issued press releases to the news media at large scandalously attacking these Plaintiffs, with no hearing or opportunity whatsoever for them to respond to these charges. If such a series of actions does not constitute a violation of a liberty interest, no course of action

does. The complaint here clearly states a valid cause of action under the clear decisions of this Court. The Court of Appeals' decision to this effect is correct without question.

II.

PETITIONERS CANNOT CONTEND THAT PLAINTIFFS WERE GIVEN A DUE PROCESS HEARING.

The contentions of Petitioners that Plaintiffs-Respondents were granted a valid due process hearing via a post-termination hearing on claims which they had filed for unemployment compensation can only be termed absurd. This issue was never presented to the District Court, which ruled on the motions to dismiss with no affirmative material before it other than the motions to dismiss. Petitioners were denied leave to file the documents which show such alleged determination in the Court of Appeals, and the Court of Appeals refused to take judicial notice of that decision. Certainly the issues sought to be raised by Petitioners on this ground are not properly a part of the record of this proceeding, or properly before this Court.

In addition, the statutes of the state of Illinois clearly state that any information presented in such a hearing is to be confidential and shall not be published "nor be used in any court in any action or proceeding pending therein, not be used in any court in any action or proceeding other than one arising out of the provisions of this Act." Ch. 48, Ill. Rev. Stats., §640. Thus, by the laws of the State of Illinois, nothing having to do with this decision of the unemployment compensation system of Illinois may be used in this proceeding.

Lastly, and most obviously, such a hearing cannot pass for a due process hearing in connection with the Governor's

vicious attack upon these individuals. In order for a hearing such as that contemplated by the Constitution, it must have some capacity for righting the wrong. Such a hearing, whether held before or after their discharge, could have no effect whatsoever upon their positions of employment with the State, or whether statements pertaining to the reasons for their discharge would be made. The question in such a hearing is not whether a discharge should occur, or whether there was sufficient reason for terminating their employment. It is a wholly specialized and collateral proceeding which can affect only one area and one area alone —entitlement to unemployment compensation benefits. It is wholly separate and apart from the Governor's office, and the Plaintiffs-Respondents' position.

This hearing can give this Court no reason to decide the issues in this case, which have been decided before, and which were determined correctly by the Court of Appeals.

III.

THIS CASE RAISES NO NOVEL QUESTIONS UNDER EITHER THE FIRST OR FOURTEENTH AMENDMENTS.

Petitioners' arguments that this case raises novel questions under the First and Fourteenth Amendments is wholly without foundation. Any alleged claim of immunity of Petitioner Walker by virtue of his position as Governor of the State of Illinois from compliance with the Constitution of the United States has been decided adversely by this Court recently in *Scheuer* v. *Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974), where this Court reaffirmed its holding in *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, that whenever a state officer acts in a manner which violates the Federal Constitution, he

> "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

The gist of this action is for the deprivation of the rights of these Plaintiffs-Respondents in interfering with their liberty interests without due process of law—actions which could only have been done by Petitioner Walker because of his elected position. It is by virtue of this position that he has been able to violate their rights, and thus has clashed with the dictates of the Constitution. He cannot use that very status which subjects him to liability to claim immunity for his actions.

The fact that Plaintiffs-Respondents have requested injunctive relief (reinstatement until such time as they have been given that due process to which they are entitled) in addition to monetary damages adds no significant dimension to this case at the present time. All that has been held by the Court of Appeals is that the Complaint states a cause of action in certain respects. Whether the District Court on remand will ever hold that injunctive relief is available or appropriate in this case is conjectural at this point. The proper and appropriate remedy available must await a further explication of the facts. The Court of Appeals has not ruled upon the propriety of such remedy.

The argument now raised by Petitioners that at some unspecified time in the future some injunctive relief may be ordered is not ripe for adjudication by this Court. It is an argument not raised in either the District Court or the Court of Appeals. There is nothing in this record which

supports Petitioners' dire prophecies of federal court intervention into State personnel decisions. It is a "bogey man" of their own invention, not yet present in this case.

The Seventh Circuit has not imposed any requirement upon the State of Illinois, or its officials which has not previously been imposed by the decisions of this Court. Petitioner's cry that they have been and will be hindered in their decision making is the same bleat heard from every despotic bureaucrat who opposes any restraint upon his unbridled ability to act with impunity.

Illinois, along with many other states, has done away with sovereign immunity. Illinois Constitution, Article VIII, §4. There is no longer any king, and every public official is responsible for his actions which tread upon the constitutional rights of others. When such a public official deprives a state employee of his livelihood and at the same time takes steps to insure that such employee will never be able to obtain other employment, by castigating him without granting that employee even a modicum of an opportunity to be heard, he cannot claim that he is acting as a responsive or responsible public official. Rather, he is trampling upon the rights of all of us. A Governor cannot claim that he is helping the public at large reach an informed opinion on matters of which he himself is not informed. What Petitioners ask is a right to do what they will to make it appear to the public that they are acting in a forthright and responsible manner while they are in reality trampling upon our most precious commodity—due process of law. This Court has reaffirmed time and time again that such actions will not be tolerated. There is no need that it do so again.

CONCLUSION

For the foregoing reasons, Respondents Samuel Indovina and Samuel Colaizzi respectfully pray that this Court deny the Petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

DANIEL WALKER, Governor of the State of Illinois, **DONALD PAGE MOORE**, Director, Office of Special Investigations, State of Illinois, and **LAURI STAPLES**,
Petitioners,

vs.

SAMUEL COLAIZZI, SAMUEL INDOVINA, THEODORE MAROS, RAMON SCULLY and **ZENITH ASSOCIATES, INC.**, an Illinois Corporation,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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ARGUMENT

I.
THE DECISION BELOW IS IN DIRECT CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT

Plaintiffs seek to combine their interest in reputation (unprotected by the Fourteenth Amendment, *Paul* v. *Davis*, 424 U.S. 693, 708 (1976)) with their interest in non-tenured public employment (also unprotected by the Fourteenth Amendment, *Bishop* v. *Wood*, ... U.S. ....., 96 S.Ct. 2074, 2080 (1976)) to create a hybrid interest which is protected by the Due Process Clause. They then argue that with such

a hybrid, the federal courts will allow them to circumvent the application of common law immunities. Each step of their argument is unfounded.

Plaintiffs correctly recognize that this Court's decisions in *Paul* v. *Davis,* 424 U.S. 693 (1976), and *Bishop* v. *Wood,* ..... U.S. ....., 96 S.Ct. 2074 (1976), established that neither a person's interest in reputation alone nor one's interest in non-tenured public employment alone arises to the level of an interest protected by the Due Process Clause. Having no direct holdings to rely upon, plaintiffs attempt to argue that *dictum* in those cases and in *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972), allows them to combine two non-protected interests into a viable federal cause of action.

Plaintiffs place much reliance on *Paul* v. *Davis,* 424 U.S. 693, 708 (1976), in which this Court interpreted *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971), as standing for the proposition that defamation, when combined with "government action [which] deprived the individual of a right previously held under state law," justified the invocation of procedural safeguards. (Response, at 4-5). Here, however, the Seventh Circuit properly concluded (App. 4) that under applicable state law, plaintiffs had no protected property rights in their non-tenured positions as appointed subordinates of the Governor. *See Board of Regents* v. *Roth,* 408 U.S. 564, 577-578 (1972); *Adams* v. *Walker,* 492 F.2d 1003, 1007-08 (7th Cir. 1974). The Seventh Circuit's decision thus conflicts directly with this Court's conclusion in *Paul* v. *Davis* (424 U.S. at 712):

> "Respondent in this case cannot assert denial of any right vouchsafed to him by the State and therefore protected under the Fourteenth Amendment. That being the case, petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause."

The same conflict appears when the analysis begins with plaintiffs' employment interests rather than plaintiffs'

reputation interests. In *Bishop* v. *Wood,* ..... U.S. ....., 96 S.Ct. 2074, 2080 (1976), this Court held:

> "In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action [the firing of an untenured employee] was regular and, if erroneous, can best be corrected in other ways."

Here, plaintiffs do not allege that petitioners possessed the unlawful motivation proscribed in *Bishop* v. *Wood.* (App. 4-5). The Seventh Circuit's decision authorizing District Court intervention into state employment decisions thus conflicts directly with the holding of *Bishop* v. *Wood.*

II.

THIS COURT MAY PROPERLY CONSIDER THE POST-TERMINATION ADMINISTRATIVE HEARINGS AFFORDED PLAINTIFFS AND THE ADMINISTRATIVE DETERMINATIONS REACHED THEREIN

If plaintiffs can properly state a federal cause of action by combining two unprotected interests into one which is protected by the Fourteenth Amendment, a determination as to whether plaintiffs were afforded an administrative hearing which satisfied due process requirements becomes an important element in this case. See *Board of Regents* v. *Roth,* 408 U.S. 564, 573 n. 1 (1972); *Arnett* v. *Kennedy,* 416 U.S. 134, 157 n. 22 (1974); *Wood* v. *Strickland,* 420 U.S. 308, 326 (1975).

Plaintiffs (Response, at 3) admit the accuracy of the Petition's description of the hearings and determinations (Petition, at 6-7), but plaintiffs seek to cover-up both the fact that they were afforded statutory administrative hearings and the fact that those hearings resulted in administrative determinations substantiating the charges upon which they

base this suit,* on the grounds that the hearings transcripts and resulting determinations are not "of record" before this Court. (Response, at 3, 7).

The Court of Appeals' decision reveals that that court took judicial notice of the administrative decisions—as was required under Rule 201(d), Fed.R.Evid.—and that it merely "declined to determine the impact" of those decisions. (App. 10). The Court of Appeals' decision does not require this Court to close its eyes to the facts of this case.

Plaintiffs further seek to hide the administrative determinations by arguing that the Illinois Unemployment Compensation Act, Ill.Rev.Stat., 1975, Ch. 48, §640, forecloses the use of hearings and resulting determinations in this or any other court. (Response, at 7). The cited statute makes "information obtained from any individual or employing unit pursuant to the administration of [the Unemployment Compensation Act]" confidential, but such information is not essential to this Court's decision on the Petition, and we do not presently seek to bring it to the Court's attention. The statute does not, however, foreclose judicial notice of the very existence of hearings held under the Unemployment Compensation Act, and it does not foreclose judicial notice of the administrative determinations

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* Under this Court's recent *per curiam* decision in *Codd* v. *Velger,* ..... U.S. ....., 45 U.S.L.W. 4175, 4176 (U.S. Feb. 22, 1977), the truth or falsity of the charges placed against plaintiffs may be determinative of whether or not they are entitled to procedural safeguards. *See Arnett* v. *Kennedy,* 416 U.S. 134, 157 (1974); *but see Bishop* v. *Wood,* ..... U.S. ....., 96 S.Ct. 2074, 2080 (1976). Because the hearings which plaintiffs received concluded in administrative determinations affirming the truth of the charges about which plaintiffs now complain, those determinations (App. 12-16) are equally relevant to this case.

entered by the Hearings Referee. Under the circumstances of this case, we respectfully submit that this Court may properly and indeed should consider the administrative hearings and determinations.

III.

PLAINTIFFS' RELIANCE ON ARTICLE VIII, §4 OF THE ILLINOIS CONSTITUTION IS MISPLACED

Plaintiffs argue that petitioners are not entitled to immunity in this civil rights suit because Illinois has abolished the doctrine of sovereign immunity. (Response, at 10). Plaintiffs, however, are not suing the State. They are suing petitioners personally for allegedly defamatory statements made in the course of their official duties and responsibilities.

As the Court of Appeals correctly recognized (App. 8-9), executive officials in Illinois are protected against defamation actions by an absolute privilege. *Blair* v. *Walker,* 64 Ill. 2d 1 (1976); *accord, Barr* v. *Matteo,* 360 U.S. 564 (1959). The "immunity" question involved here is not whether sovereign immunity bars plaintiffs' suit against petitioners, but rather whether plaintiffs can circumvent application of the Illinois doctrine of absolute privilege of executive officers against defamation suits because of the fortuity that plaintiffs were discharged from office for misconduct at the same time their misconduct was made public. That issue raises the most serious of questions under the First and Fourteenth Amendments and under principles of federalism. We respectfully submit that plaintiff's sovereign immunity issue is a straw man, and that the privilege issues of substantial importance in this case are those described in the Petition (at 9-11).

CONCLUSION

For the foregoing reasons and for all the reasons stated in the Petition, petitioners respectfully pray that this Court grant a writ of certiorari to review the judgment of the Seventh Circuit in this case.

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